

**BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA**

**IN THE MATTER OF:**

**LOGJAM REMOVAL AMENDMENTS FROM) Administrative Cause  
FLOODWAYS AND NAVIGABLE WATERS ) Number 10-063W  
FOLLOWING P.L. 76-2010 ) (LSA Document #11-170(F))**

**REPORT ON RULE PROCESSING,  
PUBLIC HEARING AND WRITTEN COMMENTS,  
RESPONSE TO COMMENTS BY DEPARTMENT OF NATURAL RESOURCES,  
AND HEARING OFFICER ANALYSES AND RECOMMENDATION REGARDING  
FINAL ADOPTION**

**1. RULE PROCESSING**

For consideration are proposed amendments to rules governing logjam removals from floodways and navigable waters under 312 IAC 10. The proposed amendments are largely a consequence of P.L. 76-2010 (H.E.A. 1232-2010) that amended IC 14-28-1-22 by adding a new subdivision (6) to subsection (b), which provides statutory exemptions from licensure, to exempt the following:

(6) The removal of a logjam or mass of wood debris that has accumulated in a river or stream, subject to the following conditions:

(A) Work must not be within a salmonid stream designated under 327 IAC 2-1.5-5 without the prior written approval of the department's division of fish and wildlife.

(B) Work must not be within a natural, scenic, or recreational river or stream designated under 312 IAC 7-2.

(C) Except as otherwise provided in Indiana law, free logs or affixed logs that are crossways in the channel must be cut, relocated, and removed from the floodplain. Logs may be maintained in the floodplain if properly anchored or otherwise secured so as to resist flotation or dislodging by the flow of water and placement in an area that is not a wetland. Logs must be removed and secured with a minimum of damage to vegetation.

(D) Isolated or single logs that are embedded, lodged, or rooted in the channel, and that do not span the channel or cause flow problems, must not be removed unless the logs are either of the following:

(i) Associated with or in close proximity to larger obstructions.

(ii) Posing a hazard to navigation.

(E) A leaning or severely damaged tree that is in immediate danger of falling into the waterway may be cut and removed if the tree is associated with or in close proximity to an obstruction. The root system and stump of the tree must be left in place.

(F) To the extent practicable, the construction of access roads must be minimized, and should not result in the elevation of the floodplain.

(G) To the extent practicable, work should be performed exclusively from one (1) side of a waterway. Crossing the bed of a waterway is prohibited.

(H) To prevent the flow of sediment laden water back into the waterway, appropriate sediment control measures must be installed.

(I) Within fifteen (15) days, all bare and disturbed areas must be revegetated with a mixture of grasses and legumes. Tall fescue must not be used under this subdivision, except that low endophyte tall fescue may be used in the bottom of the waterway and on side slopes.

The Natural Resources Commission (the “Commission”) granted preliminary adoption to the rule amendments on November 16, 2010. As reported in the Commission Minutes:

Linnea Petercheff presented this item. She said the Indiana General Assembly this year enacted new legislation regarding the removal of logjams and masses of wood debris from floodways. The legislation exempts most of these activities from DNR licensure, except licensure is still required for the removal of logjams from salmonid streams and from natural, scenic, or recreational river or streams. She said the DNR was now proposing several amendments to conform the rules to the new statutes. —There is a new definition for a “mass of wood debris” in proposed 312 IAC 10-2-29.5. 312 IAC 10-4-5 would be added to address licensure for a natural, scenic, or recreational stream or river. Here there would be “specific conditions requiring activities that take place outside the pawning season permitting access to one side of the waterways and requiring that appropriate sediment control measures of plant and vegetation on the banks when work is completed. There are only three of these rivers right now in Indiana. In 312 IAC 10-5-0.3, we’ve renewed the references to a general license for log jams. We then modified the requirements for being approved for the removal of a logjam or mass of wood debris in a salmonid stream. That’s the general license with notice to the Department in 312 IAC 10-5-6. There are seven named salmonid streams, plus Lake Michigan, as well as the waterways where trout are stocked each year by DNR. 312 IAC 10-5-6.5 establishes a general license with notice for removal of log jam or masses of debris in a natural, scenic, or recreational river or stream, only with hand-held tools used in the waterway. Removal of log jams from the bank or use of heavy equipment would require a Construction in a Floodway permit.”

John Davis reflected, “I think this pulls our rules into agreement with the law. Is that correct, Ron?”

Ron McAhron replied, “Yes, last session greatly limited our involvement in logjams down to the specific places. If I may say, Linnea has done a great of addressing those specific areas.”

Davis added, “We are going to continue to have conversations around the State about logjams. In particular, the Governor announced what I think is a very forward visionary program about buffering streams. We’re trying to acquire property in Scott County..., and they have a tremendous issue with logs. Our Division of Fish and Wildlife and our landholding divisions are going to be dealing with exactly how we interact with local communities.” He said he would be attending the Scott County Drainage Board on November 17 to discuss how DNR would deal with logjams. “Our biologists feel like debris is very, very conducive to fish and wildlife propagation.”

Donald Ruch moved to accept the preliminary adoption of amendments to 312 IAC 10, in response to HEA 1232, pertaining to the removal of log jams and masses of wood debris from floodways. R. T. Green seconded the motion. Upon a voice vote, the motion carried.

The “Notice of Intent” to adopt the proposed rule amendment was posted to the INDIANA REGISTER database website as 20110323-IR-312110170NIA on March 23, 2011. The notice identified Linnea Petercheff, Department of Natural Resources, Division of Fish and Wildlife, as the “small business regulatory coordinator” for purposes of Indiana Code § 4-22-2-28.1.

As specified by Executive Order, proposed fiscal analyses of the rule proposal were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent, to the Office of Management and Budget on March 24, 2011. In a letter dated July 5, 2011, Adam M. Horst, Director, Office of Management and Budget, recommended that the proposed rule amendments be approved.

The Commission’s Division of Hearings submitted the rule proposal to the Legislative Services Agency, along with the “Statement Concerning Rules Affecting Small Business” (also known as the “Economic Impact Statement”), on July 8, 2011. The Notice of Public Hearing was submitted to the Legislative Services Agency on July 12, 2011. The Notice of Public Hearing, along with the Economic Impact Statement and the text of the proposed rule was posted to the INDIANA REGISTER database website on July 20, 2011 as 20110720-IR-312110170PHA. Following receipt of an “Authorization to Proceed” from the Legislative Services Agency on July 12, 2011, the Division of Hearings caused a Notice of Public Hearing to be published by the Indianapolis Newspapers in the Indianapolis *Daily Star*, a newspaper of general circulation in Marion County Indiana, on July 25, 2011. In addition, the notice of the public hearing and a summary of the proposed rule changes were published on the Commission’s web-based electronic calendar.

A copy of the economic impact analysis for small business was submitted to the Indiana Economic Development Commission (the “IEDC”) on July 12, 2011. Eric P. Shields, Policy Director for the IEDC, reviewed the analysis and reported favorably to the Commission by an email letter dated August 16, 2011. Later on the same day, the Commission’s Division of Hearings, by email, thanked the IEDC. The response stated in part: “Since you have commented favorably upon the agency’s fiscal analysis, and have suggested no alternatives, the Department of Natural Resources will recommend that the Natural Resources Commission move forward with consideration for final approval.”

## 2. PUBLIC HEARING AND WRITTEN COMMENTS

### a) Public Hearing

On August 26, 2011, the public hearing was convened as scheduled by Jennifer Kane of the Division of Hearings. In attendance were Linnea Petercheff of DNR's Division of Fish and Wildlife; Michael Neyer, Director of DNR's Division of Water; and George Bowman, Assistant Director of the Division of Water. No member of the public attended the public hearing.

### b) Written Comments

Written comments were received on the Commission website. These were as follows:

**Commentor Name** Christopher M. Bower

**Commentor County** 40

**Commentor State** IN

**Commentor City** Scipio

**Commentor Organization**

**Commentor Email** [Email Commentor](#)

**Comment** I think the removal of log jams is imperative in some instances, the diversion of water through cropland being a big one. A large amount of farm ground is lost due to logjams changing the flow of creeks and rivers every year, more so in wet years like a few years ago. Some fields are even split due to the flow-change, actually causing islands the farmers can't get to.

**Time stamp** 01/05/2011 01:31:10 PM

**Commentor Name** Chris Heaton

**Commentor County** 71

**Commentor State** IN

**Commentor City** South Bend

**Commentor Organization** None

**Commentor Email** [Email Commentor](#)

**Comment** one possible addition to the proposed rule would be to add erosion control measures (sediment tarp, hay bales, etc) during the actual removal/construction operations. Similar to the requirements for Rule 5 stormwater control. This would prevent sediment deposit, erosion, and seed washout in the event of significant precipitation.

**Time stamp** 01/19/2011 09:21:29 AM

**Commentor Name** Brian Althouse

**Commentor County** 52

**Commentor State** IN

**Commentor City** Peru

**Commentor Organization**

**Commentor Email** [Email Commentor](#)

**Comment** I strongly OPPOSE this idea. Farmers do whatever they want to our watersheds, & this will also allow them to alter the flows, disturbing habitat for all wildlife, as well as moving more sediment in the water. It's time to take our natural resources back from the farmers!

**Time stamp** 01/22/2011 05:25:35 AM

**Commentor Name** Don Kessler

**Commentor County** 12

**Commentor State** IN

**Commentor City** Rossville

**Commentor Organization**

**Commentor Email** [Email Commentor](#)

**Comment** A law with these provisions is long overdue. There should never have been a rule against the removal of a log jam that interrupted the flow of a stream to the extent that flooding of land was a result. Thank you very much. Don

**Time stamp** 02/24/2011 04:36:40 PM

**Commentor Name** Brad Walter

**Commentor County** 46

**Commentor State** IN

**Commentor City** Hanna

**Commentor Organization**

**Commentor Email** [Email Commentor](#)

**Comment** I never have understood the thinking behind leaving naturally flowing rivers, streams and ditches blocked to let nature take its course. This rule change has long been needed.

**Time stamp** 02/25/2011 06:28:34 AM

**Commentor Name** Aleicia M Carol

**Commentor County** 45

**Commentor State** IN

**Commentor City** Griffith

**Commentor Organization** None

**Commentor Email** [Email Commentor](#)

**Comment** Can you please stop this. It is not human. It is not right.

Thank you for your time.

**Time stamp** 04/21/2011 11:16:28 PM

**Commentor Name** Lora Proctor

**Commentor County** 41

**Commentor State** IN

**Commentor City** Greenwood

**Commentor Organization** PETA member

**Commentor Email** [Email Commentor](#)

**Comment** To the DNR: Any law (and/or amendment to a law) which permits cruelty to an animal (or invites it) is fundamentally wrong. We humans know this and must stop animal abuse and intentional harm of animals. God created animals for us to enjoy and to love. I personally do not use animals for nourishment. However, those people who do want to eat animals must remember 2 things: Number one: Do not kill them painfully/inhumanely, EVER! Number two: Do not kill TOO MANY for nourishment-that is gluttony-one of the 7 deadly sins. Let us remember to follow God's laws according to the Bible. NEVER allow an animal to intentionally have pain inflicted on it. If humans cruelly hurt or murder an animal, they should be imprisoned and prosecuted no differently than if this was done by a human to another human. Remember, DNR and all lawmakers-GOD is watching. Let's all spend eternity in heaven together-humans and our precious animals. Thank you for listening.

**Time stamp** 04/30/2011 10:52:02 AM

**Commentor Name** Marian Rosenblum

**Commentor County** Out of State

**Commentor State** TX

**Commentor City** Coppell

**Commentor Organization**

**Commentor Email** [Email Commentor](#)

**Comment** Dear Commissioners,

I am appalled to learn that the State of Indiana is considering legalizing coyote and fox penning year-round, where coyotes and foxes are placed in fenced enclosures and packs of dogs chase them in competition. Evidence shows that many of these wild canines are mauled and killed by their domestic cousins.

In essence, Indiana is considering sanctioning an activity where animals can be torn apart as "live bait" in canned-hunting-like operations. This is reprehensible and contravenes any notion of fair chase.

Like the rest of the nation, Indiana has banned dogfighting and cockfighting. Coyote and fox penning is akin to both activities and for this reason alone should be banned.

The inherent cruelty associated with fox and coyote penning cannot be remedied through regulation. Creating new rules would require enforcement, and enforcing abhorrent activities of this type is not an appropriate use of state resources in the best of times, and certainly not during these hard economic times.

The Indiana Department of Natural Resources has acknowledged that there is ecological, ethical, disease, and health related issues, associated with penning; and Florida unanimously voted to prohibit this type of penning last year. Indiana should do the same.

I urge you to reject the proposal to legalize coyote and fox penning and instead adopt rules to ban this practice. I strongly oppose coyote and fox pens, and respectfully ask that you stop this horrific and cruel practice.

Marian Rosenblum  
901 Spyglass Cove  
Coppell, Texas 75019

**Time stamp** 05/04/2011 12:36:47 PM

**Commentor Name** steven ile

**Commentor County** 46

**Commentor State** IN

**Commentor City** hamlet

**Commentor Organization** grand kankakee hunt club

**Commentor Email** [Email Commentor](#)

**Comment** A farmer will call any blockage a problem!!!! But to a duck hunter or fishermen this great habitate. Who decides what is best ?? Things must be fixed in the rivers but farmers do not always have wildlife interest in the discusion.

**Time stamp** 05/26/2011 10:36:34 AM

**Commentor Name** Michael Young

**Commentor County** 87

**Commentor State** IN

**Commentor City** Tennyson

**Commentor Organization** NA

**Commentor Email** [Email Commentor](#)

**Comment** Honest I can not see a singlre person going thru all the stuff you have to go thru to get a license just to remove a log jam - let's be serious- how much money are you wanting for this license? and who knows how long it takes to recieve - months(?) - and then are we now going to charge people to come review (full study) amount of logs in this jam- are we going to be charged per log - (that's next) - I know I'm being snide in comments but I'm trying to show equally how stuid this is - in the mean time while the requestor waits for license/permioassion their land is being flooded causing unknown amount of damage - requestor waits - everyone hates that so they'll call several times to check status or much latter their request is returned to them because their spelling was encarett - note speeling - please do not reject). This is more red tape that will end up making criminals out of honest working people concerned about their land. Maybe the state should remove and clear/maintain all ditches like the one in Spencer county that floods the roads making impassable.

Maybe I don't understand fully what you are after here but from what I see this is another waste of tax dollars by even discussing - however - all this said I will agree in certain cases (externe cases - rare) I can see permission being required whenever dangerous methods (example - explosives) are required to remove or if/when/where life could be put at risk (people sometimes do the not so sane things - you often have to save them from themselves) I understand in rare cases but not a license. If I go and remove a few sticks from a ditch to allow water to flow again freely I don't want to have to pay a fine becuse I don't have a license - let's use some common sense please!!!!!!!!!!!!!! Problem with common sense is it is so uncommon.

**Time stamp** 06/15/2011 08:58:33 AM

**Commentor Name** Christopher A Carver Jr.

**Commentor County** 26

**Commentor State** IN

**Commentor City** owensville

**Commentor Organization**

**Commentor Email** [Email Commentor](#)

**Comment** I concur with this, its a good thing to let the Indiana DNR know of such jams and report the removal

**Time stamp** 07/07/2011 07:54:16 PM

**Commentor Name** Allen Pursell

**Commentor County** 31

**Commentor State** IN

**Commentor City** Lanesville

**Commentor Organization**

**Commentor Email** [Email Commentor](#)

**Comment** Logjams are natural occurrences in healthy rivers and streams. They provide an important service in slowing the movement of flood waters which can reduce peak flood elevations, provide fish habitat, and can even reduce bank erosion. There are some instances when logjams cause property damage and under these circumstance they may need to be removed. Nevertheless removal of logjams should be not be a commonplace occurrence, especially in streams that have been designated as natural and scenic. I am against any effort to make logjam removal easy in streams that are thus designated. In addition, some of the provisions of the proposed rule are vague and will be prone to misuse.

1) 10-2-29.5 (1) The phrase "threatening to cause" should be removed from the definition. Anyone can make a claim that a logjam is "threatening to cause" flooding even if the logjam has never caused flooding and is unlikely to ever cause flooding of a road or private property.

2) 10-4-5 (c) (2) The word "unreasonable" and "known" should be struck. What determines "unreasonable"? Could a permittee claim it was "reasonable" to destroy a mussel bed containing hundreds of individual mussels because it was the only access to the logjam? Without a definition of "unreasonable" anything becomes "reasonable" and therefore permitable in spite of how destructive it might be. As for "known" does this mean "known" to the permittee or to the DNR? At a minimum the rule should establish that wheeled or tracked equipment cannot be used to remove a logjam within 150 feet of a mussel bed due to the high risk of destruction presented by use of this equipment. Perhaps the definition of "mussel bed" should also be included.

3) 10-5-6 (d) and 10-5-6.5 (d) Logically, the department ought also have the right to deny the permit, especially if the risk of habitat destruction is thought to outweigh any benefit to be gained from the removal of the logjam in the professional judgment of the Division Director.

**Time stamp** 07/20/2011 07:10:49 PM

**Commentor Name** Justin Schneider

**Commentor County** 49

**Commentor State** IN

**Commentor City** Indianapolis

**Commentor Organization** Indiana Farm Bureau, Inc.

**Commentor Email** [Email Commentor](#)

**Comment** On behalf of the members of Indiana Farm Bureau, Inc., we want to thank DNR and the Natural Resources Commission for promulgating this rule. Farmers are greatly impacted by log jams which impede water flow and obstruct drainage, leading to crop damage and the inability to plant vital acreage for crop production. Through the adoption of this rule, log jam removal can be accomplished more timely and with fewer hassles of paperwork, leading to productive time addressing the problem.

Farm Bureau policy supports the ability to remove snags and small log jams without the need for a permit. We believe that the general license provisions of this rule are in line with the policy direction which our members are advocating. Additionally, the adoption of this rule will create a more consistent regulatory process across the board for the removal of log jams from rivers and streams in Indiana. We strongly support efforts which make the regulatory process easier to understand, thus leading to better compliance. We support the adoption of this proposed rule.

Any questions with respect to these comments may be addressed to Justin Schneider at [jschneider@infarmbureau.org](mailto:jschneider@infarmbureau.org).

Respectfully submitted,

Justin T. Schneider

**Time stamp** 08/29/2011 05:22:33 AM

**Commentor Name** Tim Maloney

**Commentor County** 49

**Commentor State** IN

**Commentor City** Indianapolis

**Commentor Organization** Hoosier Environmental Council

**Commentor Email** [Email Commentor](#)

**Comment** To the Hearing Officer:

The Hoosier Environmental Council submits the following comments on the proposed Logjam Removal Rule:

1) We request a clarification of the authority for 312 IAC 10-5-6.5, establishing a general license for removal of logjams from natural, scenic, or recreational rivers. The exemption for removal of logjams from the Indiana Flood Control Act's requirement for a construction in a floodway permit does not appear to include work in a natural, scenic, or recreational river or stream, according to subsection (b)(6)(B) of IC 14-28-1-22.

2) We request that the rule include a provision requiring that the written notices for a general license under the proposed rule, and the Department's written responses, be posted on-line in the Department's permit database, and also be made available to interested parties upon request.

Thank you for the opportunity to comment.

Tim Maloney

Senior Policy Director

**Time stamp** 08/29/2011 02:05:48 PM

### 3. RESPONSE TO COMMENTS BY DEPARTMENT OF NATURAL RESOURCES

The Department of Natural Resources responded to public comments in an August 30, 2011 email:

The Indiana General Assembly, in House Enrolled Act 1232, passed legislation in 2010 to exempt the removal of logjams or masses of wood debris from permit requirements, with the exception of salmonid streams and natural, scenic and recreational rivers & streams, as follows:

#### ***IC 14-28-1-22***

*... (b) This section does not apply to the following:*

*.... (6) The removal of a logjam or mass of wood debris that has accumulated in a river or stream, subject to the following conditions:*

*(A) Work must not be within a salmonid stream designated under 327 IAC 2-1.5-5 without the prior written approval of the department's division of fish and wildlife.*

*(B) Work must not be within a natural, scenic, or recreational river or stream designated under 312 IAC 7-2.*

*(C) Except as otherwise provided in Indiana law, free logs or affixed logs that are*

*crossways in the channel must be cut, relocated, and removed from the floodplain. Logs may be maintained in the floodplain if properly anchored or otherwise secured so as to resist flotation or dislodging by the flow of water and placement in an area that is not a wetland. Logs must be removed and secured with a minimum of damage to vegetation.*

*(D) Isolated or single logs that are embedded, lodged, or rooted in the channel, and that do not span the channel or cause flow problems, must not be removed unless the logs are either of the following:*

*(i) Associated with or in close proximity to larger obstructions.*



- (ii) Posing a hazard to navigation.*
- (E) A leaning or severely damaged tree that is in immediate danger of falling into the waterway may be cut and removed if the tree is associated with or in close proximity to an obstruction. The root system and stump of the tree must be left in place.*
- (F) To the extent practicable, the construction of access roads must be minimized, and should not result in the elevation of the floodplain.*
- (G) To the extent practicable, work should be performed exclusively from one (1) side of a waterway. Crossing the bed of a waterway is prohibited.*
- (H) To prevent the flow of sediment laden water back into the waterway, appropriate sediment control measures must be installed.*
- (I) Within fifteen (15) days, all bare and disturbed areas must be revegetated with a mixture of grasses and legumes. Tall fescue must not be used under this subdivision, except that low endophyte tall fescue may be used in the bottom of the waterway and on side slopes.*

The DNR proposed the revisions to these rules to comply with this state law that exempts the removal of logjams and masses of wood debris from license requirements, with the exception of those in salmonid streams or in natural, scenic, or recreational rivers or streams.

The rule language in 312 IAC 10-4-5 sets forth requirements for the removal of logjams or masses of wood debris in a natural, scenic, or recreational river or stream under a license issued by the DNR when equipment is used other than hand-held tools. The proposed rule in 312 IAC 10-5-6.5 would allow the removal of logjams or masses of wood debris from a natural, scenic, or recreational river or stream under a general license with notice to the DNR when the logjams are removed by hand or hand-held tools only, such as axes, chain saws, and portable winches. There is no fee for the notice requirement under this general license. There are only three (3) rivers that have this special designation as a natural, scenic, or recreational river or stream (312 IAC 7-2-2, 7-2-3 and 7-2-4), and they are the following rivers: (1) Blue River in Crawford, Harrison, and Washington counties; (2) Cedar Creek in Allen and Dekalb counties; and (3) Wildcat Creek in Carroll and Tippecanoe counties.

Requirements for the removal of a logjam or mass of wood debris in a salmonid stream are found in 312 IAC 10-5-6; there is no fee for this notice requirement under this general license. There are seven (7) named salmonid streams, plus an additional twenty (20) streams that are stocked by the DNR for put-and-take trout fishing under 321 IAC 2-1.5-5(a)(3).

A comment expressed concern about erosion control measures during the actual removal or construction operations. In 312 IAC 10-5-6(c)(5)(H), the DNR has proposed to require the installation of appropriate sediment control measures during the removal/construction operation. The DNR would also have the ability to require sediment control measures as a condition of the approval for the logjam removal in 312 IAC 10-5-6.5(d). However, the DNR cannot add this requirement for the removal of logjams or masses of wood debris unless a license is required.

A comment was submitted regarding the ability to deny the request under the general license with notice in 312 IAC 10-5-6(d) and 10-5-6.5(d). Subsections (d)(4) of each of these rules would allow the DNR to require the person to obtain an individual license for

the activity under IC 14-28-1 or IC 14-29-1. By doing so, the DNR would have the ability to more thoroughly review the project and issue or deny the license in accordance with IC 14-28-1-23 or IC 14-29-1-8.

A comment was submitted regarding the definition of a “mass of wood debris” as proposed in 312 IAC 10-2-29.5. The DNR believes that the words “causing or threatening to cause flooding” are necessary because individuals should be able to remove a mass of wood debris before it causes flooding, especially when it is obvious that the mass would cause flooding with additional rain or snow melt. Furthermore, the definition is consistent with the definition of the term “logjam” that is defined in 312 IAC 10-2-26. The definition of “logjam” includes “an accumulation of lodged trees, root wads, or other debris that impedes the ordinary flow of water through a waterway.” This accumulation or blockage could also be causing or threatening to cause flooding.

As the result of a comment about the term “unreasonable” in 312 IAC 10-4-5 governing the removal of logjams in natural, scenic, or recreational rivers or streams by methods other than hands or hand-held tools, the DNR is recommending that the term “unreasonable” be removed in 312 IAC 10-4-5(c)(2) because it is not defined in 312 IAC 10 or IC 14-28-1 and could become subjective for enforcement. However, the DNR believes that the term “known” is still needed for mussel resources because occasionally, mussel beds are found in locations that were not previously known. Additionally, the DNR does not publicize the locations of mussel beds in Indiana. Therefore, 312 IAC 10-4-5(c)(2) should read as follows:

- (c) Removal of the logjam or mass of wood debris must not result in the taking of:**
  - (1) a species listed in the “Roster of Indiana Animals, Insects, and Plants that are Extirpated, Endangered, Threatened, or Rare (also described as Special Concern)”, Information Bulletin #2-Fourth Amendment (August 1, 2007), published in the Indiana REGISTER at 20070815-IR-312070469NRA; or**
  - (2) a known mussel resource.**

#### **4. HEARING OFFICER ANALYSES AND RECOMMENDATION REGARDING FINAL ADOPTION**

Several of the comments speak to broad policy implications for requiring licensure, or exempting from licensure, the removal of logjams from floodways and navigable waters. For the most part, these policy elections were made by the Indiana General Assembly with the enactment of P.L.76-2010 (H.E.A. 1232). With the amendments currently under consideration, the Commission would reflect in the rule the legislative elections and would include refinements on the edges of the regulatory structure. In its response to public comments, the Department of Natural Resources offered justifications for the limited policy elections which are to be made by the Commission. The policy elections included in the proposed amendments appear to be lawful. Whether to adopt them is a decision within the sound discretion of the Commission. The

modified language proposed by the DNR at 312 IAC 10-4-5(c)(2) appears to constitute a logical outgrowth that was derived from a public comment.

The Hoosier Environmental Council offers a comment that speaks to the legal authority of the Commission to approve a general license to remove logjams from a natural, scenic, or recreational river.

We request a clarification of the authority for 312 IAC 10-5-6.5, establishing a general license for removal of logjams from natural, scenic, or recreational rivers. The exemption for removal of logjams from the Indiana Flood Control Act's requirement for a construction in a floodway permit does not appear to include work in a natural, scenic, or recreational river or stream, according to subsection (b)(6)(B) of IC 14-28-1-22.

In amending IC 14-28-1-22, the Indiana General Assembly did not exempt natural, scenic, or recreational rivers from licensure. But the Commission has independent authority under IC 14-10-2-4(b) “to exempt an activity from licensing” under IC 14-28-1 “if the activity poses not more than a minimal potential for harm.” The authority may be most appropriately exercised to implement a regulatory program, not through a blanket exemption, but through a general permit with parameters that manage the potential for harm. The authority to implement an exemption includes the authority to substitute a general license for an individual license. Illustrative is *Brown and Zeller, et al. v. DNR*, 9 Caddnar 136, 138 (2004) in which the Commission determined the authority to exempt was exercised appropriately through a general license that allowed the placement of qualified temporary piers in a public freshwater lake. If the Commission is satisfied authorizing a general license for qualified logjam removals from natural or scenic rivers “poses no more than a minimum potential for harm,” the general license appears to be lawful. The question is not then one of legal authority but rather one of policy election.

The Hoosier Environmental Council also urges that “the rule include a provision requiring that the written notices for a general license under the proposed rule, and the Department’s written responses, be posted on-line in the Department’s permit database, and also be made available to interested parties upon request.” The general permits anticipated by 312 IAC 10-5-6 (salmonid streams) 312 IAC 10-5-6.5 (natural or scenic rivers) are made with notice to the Department. Management of the licensure database is through the Department’s Division of Water. Rule adoption has not typically been directed to database management. But contingent on technical

feasibility and cost, the concept does not appear unreasonable on its face. The hearing officer does not recommend a rule modification but does recommend this aspect of HEC's comment be considered by the Commission and the Department for favorable action. Consideration should be given to causing the Division of Water's database to post general permits made with notice under 312 IAC 10-5-6 and 312 IAC 10-5-6.5. The general permits are presumably public records that also would be available upon request.

The hearing officer presents the proposed amendments to rules for logjam removals to be considered for final adoption as attached in Exhibit "A".

Dated: September 1, 2011

\_\_\_\_\_  
Stephen L. Lucas  
Hearing Officer

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## Exhibit "A"

### TITLE 312 NATURAL RESOURCES COMMISSION

#### Final Rule LSA Document #11-170(F) DIGEST

Adds 312 IAC 10-2-29.5 to define a mass of wood debris. Adds 312 IAC 10-4-5 to authorize a license for the removal of a logjam or mass of wood debris in a natural, scenic, or recreational river. Amends 312 IAC 10-5-0.3 to remove the reference to logjams and make other technical corrections. Amends 312 IAC 10-5-6 governing the removal of logjams in salmonid streams with written notice to the department. Adds 312 IAC 10-5-6.5 to allow the removal of logjams in natural, scenic, and recreational rivers under a general license with written notice to the department. Repeals 312 IAC 10-5-0.6. Effective 30 days after filing with the Publisher.

**312 IAC 10-2-29.5; 312 IAC 10-4-5; 312 IAC 10-5-0.3; 312 IAC 10-5-0.6; 312 IAC 10-5-6; 312 IAC 10-5-6.5**

SECTION 1. 312 IAC 10-2-29.5 IS ADDED TO READ AS FOLLOWS:

**312 IAC 10-2-29.5 "Mass of wood debris" defined**  
**Authority:** IC 14-10-2-4; IC 14-28-1-5; IC 14-28-1-22; IC 14-29-1-8  
**Affected:** IC 14-28-1; IC 14-29-1

**Sec. 29.5. "Mass of wood debris" means an accumulation of lodged trees or other woody debris that is any of the following:**

**(1) Causing or threatening to cause flooding on a road or private property.**

- (2) Impeding navigation by a boat.
  - (3) Reducing the capacity of a waterway to transport water.
- (Natural Resources Commission; 312 IAC 10-2-29.5)

SECTION 2. 312 IAC 10-4-5 IS ADDED TO READ AS FOLLOWS:

**312 IAC 10-4-5 Removal of logjams or masses of wood debris from a natural, scenic, or recreational river or stream**

**Authority:** IC 14-10-2-4; IC 14-28-1-5; IC 14-28-1-22; IC 14-29-1-8

**Affected:** IC 14-28-1; IC 14-29-1

**Sec. 5. (a)** If the department issues a license under this section, a person may remove a logjam or wood debris from a waterway included in the Indiana natural, scenic, and recreational river system under 312 IAC 7-2.

**(b)** A person issued a license under this section must comply with these conditions:

- (1) Limit activities to the use of an excavator, small tractor, or similar equipment.
  - (2) Remove a logjam or mass of wood debris only from July 1 through March 31 of the following year, unless the logjam or wood debris is deposited as a result of a flood for which the governor has declared a disaster.
  - (3) Use an access road that would not:
    - (A) destroy more than one-half (1/2) acre of trees within a floodway;
    - (B) traverse a wetland indicated on the national wetlands inventory map, unless pads are used;
    - (C) raise the elevation of the flood plain; or
    - (D) cross a waterway.
  - (4) Obtain access exclusively from one (1) side of a waterway.
  - (5) Install appropriate sediment control measures to prevent the flow of sediment-laden water back into the waterway.
  - (6) Revegetate all bare and disturbed areas with a mixture of grasses and legumes within fifteen (15) days of completion of work. Tall fescue must not be used under this subsection, except that low endophyte tall fescue may be used in the bottom of the waterway and on side slopes. If the season is not conducive to revegetation, a site must be covered with appropriate erosion control blankets to stabilize the shoreline.
- (c)** Removal of a logjam or mass of wood debris must not result in the taking of:
- (1) a species listed in the "Roster of Indiana Animals, Insects, and Plants that are Extirpated, Endangered, Threatened, or Rare (also described as Special Concern)", Information Bulletin #2-Fourth Amendment (August 1, 2007), published in the Indiana Register at 20070815-IR 312070469NRA; or
  - (2) a known mussel resource.

(Natural Resources Commission; 312 IAC 10-4-5)

SECTION 3. 312 IAC 10-5-0.3 IS AMENDED TO READ AS FOLLOWS:

**312 IAC 10-5-0.3 Determining project eligibility for a general license; general criteria**

**Authority:** IC 14-10-2-4; IC 14-28-1-5; IC 14-28-1-22; IC 14-29-1-8

**Affected:** IC 14-28-1; IC 14-29-1

**Sec. 0.3. (a)** Except as provided in ~~subsections~~ **subsection** (b), and (c), a project for a utility line crossing ~~the removal of logjams and obstructions,~~ or the placement of outfall projects within a floodway is eligible for a general license if the project satisfies the requirements of this rule. For the removal of logjams and obstructions, these requirements include the procedures established by section 0.6 ~~6~~ of this rule **and by IC 14-28-1-22.**

**(b)** Subsection (a) does not authorize a project in any of the following circumstances:

- (1) Within a river or stream listed in the Indiana Register at 16 IR 1677 in the Outstanding Rivers List for Indiana unless prior written approval from the division of water's **fish and wildlife's** environmental unit has been obtained.
- (2) Within a salmonid stream designated under 327 IAC 2-1.5-5(a)(3).

- (3) Within a natural, scenic, or recreational river or stream designated under 312 IAC 7-2.
- (4) For a utility line crossing, below the ordinary high watermark of a navigable waterway listed in the Indiana Register at 20 IR 2920 in the Roster of Indiana Waterways Declared Navigable or Nonnavigable, unless the utility line is placed beneath the bed of the waterway under section 4(b) of this rule.
- (5) Where ~~If~~ the project requires an individual permit from the United States Army Corps of Engineers under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.
- ~~(c) Subsection (a) does not authorize the removal of logjams or obstructions within one-half (1/2) mile of any of the following:~~
  - ~~(1) A species listed in the Indiana Register at 15 IR 1312 in the Roster of Indiana Animals and Plants Which Are Extirpated, Endangered, Threatened, or Rare.~~
  - ~~(2) A known mussel resource.~~
  - ~~(3) An outstanding natural area, as contained on the registry of natural areas maintained in the natural heritage data center of the department.~~
- ~~(d) The limitations contained in subsection (b) and subsection (c) do not apply to section 7 of this rule. (Natural Resources Commission; 312 IAC 10-5-0.3; filed Aug 2, 2004, 3:18 p.m.: 27 IR 3875; readopted filed Jul 21, 2008, 12:00 p.m.: 20080813-IR-312080072RFA)~~

SECTION 4. 312 IAC 10-5-6 IS AMENDED TO READ AS FOLLOWS:

**312 IAC 10-5-6 Removal of logjams or masses of wood debris from a salmonid stream; general license with notice**

**Authority:** IC 14-10-2-4; IC 14-28-1-5; IC 14-28-1-22; IC 14-29-1-8

**Affected:** IC 14-28-1; IC 14-29-1

- Sec. 6. (a) This section establishes a general license for the removal of logjams **or masses of wood debris** from a waterway **that is a salmonid stream designated under 327 IAC 2-1.5-5** for the purpose of providing maintenance to help control flooding.
- (b) This section does not authorize the removal of logjams and obstructions from a waterway ~~identified under section 0.3 of this rule.~~ **other than a salmonid stream designated under 312 IAC 2-1.5-5.**
- (c) A person who wishes to implement a project ~~for obstruction removal~~ **to remove logjams or masses of wood debris** from a waterway ~~not under section 0.3 of this rule~~ **referenced in subsection (a)** must file a written notice, upon a department form, with the division of water's **fish and wildlife's** environmental unit, including the following information:
- (1) A description of the river or stream where obstruction removal would occur, including the terminal points, access routes, and disposal sites of the project referenced to readily discernible landmarks, for example, a bridge or a dam. The project shall be designated with access routes to the obstruction on:
    - (A) a United States Geological Survey topographic map; **or**
    - ~~(B) a national wetlands inventory map; or~~
    - ~~(C) (B)~~ **(B)** another map determined by the department to satisfy the purposes of this section.
  - (2) The name, address, and telephone number of the person who is seeking the general authorization. **license.** If all or some of the activities ~~will~~ **would** be performed on behalf of the person by an independent contractor, the name, address, and telephone number of the independent contractor ~~shall~~ **must** also be provided.
  - (3) **Documentation that** the person is the owner of the river or stream (or the sole riparian owner along a navigable river or stream), or another basis by which the person demonstrates permission to enter upon the project site and to perform logjam removal. Permission must be demonstrated for an access route and for a site where logs or other debris will be secured following removal from the waterway. The person must also show participation or agreement by other interested persons in the following circumstances:
    - (A) With respect to a regulated drain, by the drainage board.
    - (B) With respect to a mutual drain, by all the beneficiaries to the drain.
    - (C) By the governing body of any county, municipality, or conservancy district in which the project is located.
  - (4) Photographs, videotapes, or other graphic documentation that demonstrate the following conditions exist on the waterway:
    - (A) Accumulations of logs, root wads, and other debris that occasionally or frequently span the waterway and may be interlocked.

- (B) Large amounts of fine sediments have not covered or become lodged in the obstruction.
- (C) Accumulations are extensive enough to cause bank erosion and upstream ponding damages.
- (5) A statement by the person, including the following terms and agreements:
- (A) Obstructions ~~will~~ **would** be removed through the use of hand-operated equipment, such as axes, chain saws, and portable winches.
- (B) Any site ~~will~~ **would** be identified within the project for which the use of hand-operated equipment is determined to be impracticable. If a site is identified under this subdivision, the statement must include **the following:**
- (i) What equipment would be used. ~~and~~
- (ii) That the equipment ~~will~~ **would** not be equipped for excavation.
- (iii) **That the equipment would be used only from the bank and not placed in the waterway.**
- Examples of equipment that may be suitable include ~~the following:~~
- (i) ~~a small tractor,~~
- (ii) ~~a backhoe equipped with a hydraulic thumb,~~
- (iii) ~~a bulldozer with its blade up, and~~
- (iv) ~~a log skidder.~~
- (C) Free logs or affixed logs that are crossways in the channel ~~will~~ **and proposed to be removed by the applicant would** be cut, relocated, and removed from the flood plain unless the logs are piled and secured by cables in an area not threatened by the flow of water. Logs ~~will~~ **would** be removed and secured ~~with a minimum to minimize~~ damage to vegetation and **would be** placed outside any wetlands.
- (D) Isolated or single logs that are embedded, lodged, or rooted in the channel and do not span the channel or cause flow problems ~~will~~ **would** not be removed unless:
- (i) associated with or in close proximity to larger obstructions **that are impeding navigation or the flow of water;** or
- (ii) posing a hazard to navigation.
- (E) A severely damaged ~~or leaning or other damaged~~ tree that is in immediate danger of falling into the waterway ~~may~~ **would** be cut and removed ~~but only if the tree is associated with or in close proximity to an obstruction that impedes navigation or the flow of water in the waterway.~~ The root system and stump of the tree ~~will~~ **would** be left in place.
- (F) No access road ~~will~~ **would** be constructed that ~~will~~ **would** do any of the following:
- (i) Destroy more than one (1) acre of trees within a floodway.
- (ii) Traverse a wetland indicated on the national wetlands inventory map, unless pads are used.
- (iii) Raise the elevation of the flood plain.
- (iv) Cross a waterway.
- (G) Work ~~shall~~ **would** be conducted exclusively from one (1) side of a ~~river or stream.~~ **waterway.**
- (H) **To prevent the flow of sediment laden water back into the waterway, appropriate sediment control measures would be installed.**
- (I) **Within fifteen (15) days of completion of work, all bare and disturbed areas would be revegetated with a mixture of grasses and legumes. Tall fescue would not be used under this section, except that low endophyte tall fescue may be used in the bottom of the waterway and on side slopes. If the season is not conducive to revegetation, a site would be covered with appropriate erosion control blankets to stabilize the shoreline.**
- (J) **Except from June 16 through July 14 and from December 1 through March 14, work would be conducted only with hand-operated equipment.**
- (d) **Within twenty (20) days (excluding Saturdays, Sundays, and legal holidays) after the receipt of a written notice under subsection (c), the department shall act upon the provide a written notice as set forth under section 0.6 of this rule. response that does one (1) of the following:**
- (1) **Approves the terms of the notice.**
- (2) **Provides additional conditions to the approval.**
- (3) **Requires additional information regarding any of the following:**
- (A) **The capacity of the floodway.**
- (B) **The safety of life or property.**
- (C) **The effects upon fish, wildlife, or botanical resources.**
- (4) **Requires the person to obtain an individual license for the activity under IC 14-28-1 or IC 14-29-1, or both.**
- If the department does not respond under this subsection in a timely fashion, the written notice is

**approved.**

(e) A general license for obstruction removal under this section expires (1) ninety (90) days after the receipt of the department's written approval. ~~under section 0.6(c) of this rule. (2) If there is no response by the department under section 0.6(c) of this rule and the applicant acts under section 0.6(d) of this rule, one hundred five (105) days after the date recorded on the applicant's certificate of mailing.~~

(f) A person who elects to act under ~~this~~ a general license **issued under this section** must comply with **both of the following:**

(1) The terms of the written notice provided under subsection (c). ~~and with~~

(2) Any additional conditions provided by the department under section 0.6(c) of this rule. **subsection (d) and IC 14-28-1-22.**

Failure to comply with these terms and conditions may result in the revocation of the general license, a civil penalty, a commission charge, and any other sanction provided by law for the violation of a ~~permit~~ **license** issued under IC 14-28-1 or, if the waterway is navigable, the violation of a license issued under IC 14-29-1.

*(Natural Resources Commission; 312 IAC 10-5-6; filed Jul 5, 2001, 9:12 a.m.: 24 IR 3396, eff Jan 1, 2002; filed Aug 2, 2004, 3:18 p.m.: 27 IR 3878; readopted filed Jul 21, 2008, 12:00 p.m.: 20080813-IR-312080072RFA)*

SECTION 5. 312 IAC 10-5-6.5 IS ADDED TO READ AS FOLLOWS:

**312 IAC 10-5-6.5 Removal of logjams or masses of wood debris from a natural, scenic, or recreational river or stream; general license with notice**

**Authority:** IC 14-10-2-4; IC 14-28-1-5; IC 14-28-1-22; IC 14-29-1-8

**Affected:** IC 14-28-1; IC 14-29-1

**Sec. 6.5. (a)** This section establishes a general license for the removal of logjams or masses of wood debris from a waterway that is a natural, recreational, or scenic river designated under 312 IAC 7-2 for the purpose of providing maintenance to help control flooding.

**(b)** This section does not authorize the removal of logjams and obstructions from waterways other than natural, recreational, or scenic rivers designated under 312 IAC 7-2.

**(c)** A person who wishes to implement a project to remove logjams or masses of wood debris from a waterway referenced in subsection (a) must file a written notice, upon a department form, with the division of fish and wildlife's environmental unit, including the following information:

**(1)** A description of the river or stream where obstruction removal would occur, including the terminal points, access routes, and disposal sites of the project referenced to readily discernible landmarks, for example, a bridge or a dam. The project shall be designated with access routes to the obstruction on:

**(A)** a United States Geological Survey topographic map; or

**(B)** another map determined by the department to satisfy the purposes of this section.

**(2)** The name, address, and telephone number of the person who is seeking the general license. If all or some of the activities would be performed on behalf of the person by an independent contractor, the name, address, and telephone number of the independent contractor must also be provided.

**(3)** Documentation that the person is the owner of the river or stream (or the sole riparian owner along a navigable waterway), or another basis by which the person demonstrates permission to enter upon the project site and to perform logjam removal. Permission must be demonstrated for an access route and for a site where logs or other debris would be secured following removal from the waterway. The person must also show participation or agreement by other interested persons in the following circumstances:

**(A)** With respect to a regulated drain, by the drainage board.

**(B)** With respect to a mutual drain, by all the beneficiaries to the drain.

**(C)** By the governing body of any county, municipality, or conservancy district in which the project is located.

**(4)** Photographs, videotapes, or other graphic documentation that demonstrate the following conditions exist on the waterway:

**(A)** Accumulations of logs, root wads, and other debris that occasionally or frequently span the



waterway and may be interlocked.

(B) Large amounts of fine sediments have not covered or become lodged in the obstruction.

(C) Accumulations are extensive enough to cause bank erosion and upstream ponding damages.

(5) A statement by the person, including the following terms and agreements:

(A) Obstructions would be removed from the waterway exclusively by hand or handheld tools, such as axes, chain saws, and portable winches.

(B) Free logs or affixed logs that are crossways in the channel and proposed to be removed by the applicant would be cut, relocated, and removed from the flood plain unless the logs are piled and secured by cables in an area not threatened by the flow of water. Logs would be removed and secured with a minimum damage to vegetation and placed outside any wetlands.

(C) Isolated or single logs that are embedded, lodged, or rooted in the channel and do not span the channel or cause flow problems would not be removed unless:

(i) associated with or in close proximity to larger obstructions that are impeding navigation or causing erosion; or

(ii) posing a hazard to navigation.

(D) A severely damaged or leaning tree that is in immediate danger of falling into the waterway would be cut and removed only if the tree is associated with or in close proximity to an obstruction that impedes navigation or is causing erosion. The root system and stump of the tree would be left in place.

(E) A logjam or mass of wood debris would be removed only from July 1 through March 31 of the following year, unless the logjam or wood debris is deposited as a result of a flood for which the governor has declared a disaster.

(d) Within twenty (20) days (excluding Saturdays, Sundays, and legal holidays) after the receipt of a written notice under subsection (c), the department shall provide a response that does one (1) of the following:

(1) Approves the terms of the notice.

(2) Provides additional conditions to the approval.

(3) Requires additional information regarding any of the following:

(A) The capacity of the floodway.

(B) The safety of life or property.

(C) The effects upon fish, wildlife, or botanical resources.

(4) Requires the person to obtain an individual license for the activity under IC 14-28-1 or IC 14-29-1, or both.

If the department does not respond under this subsection in a timely fashion, the written notice is approved.

(e) A general license for obstruction removal under this section expires ninety (90) days after receipt of the department's written approval.

(f) A person who elects to act under a general license issued under this section must comply with both of the following:

(1) The terms of the written notice provided under subsection (c).

(2) Any additional conditions provided by the department under subsection (d) and IC 14-28-1-22.

Failure to comply with these terms and conditions may result in the revocation of the general license, a civil penalty, a commission charge, and any other sanction provided by law for the violation of a permit issued under IC 14-28-1 or, if the waterway is navigable, the violation of a license issued under IC 14-29-1.

*(Natural Resources Commission; 312 IAC 10-5-6.5)*

SECTION 6. 312 IAC 10-5-0.6 IS REPEALED.